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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 463

STEWART L. UDALL, SECRETARY OF THE INTERIOR, *Petitioner*,

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT PACIFIC NORTHWEST POWER COMPANY

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BRIEF FOR RESPONDENT PACIFIC NORTHWEST POWER COMPANY

Questions Presented

Section 7(b) of the Federal Power Act provides that the Commission shall not award a license for a hydroelectric project "[w]henever, in the judgment of the Commission," the development "should be undertaken by the United States itself." In this case, the Commission concluded, after a lengthy hearing, that the project proposed by respondent Pacific Northwest Power Company would, within the meaning of section 10(a) of the Act, be "best adapted to a comprehensive plan" for developing the resources in question. Petitioner concedes that any project built by the federal government would not differ substantially from

Pacific Northwest's project in a physical sense. Petitioner does not dispute that Pacific Northwest would operate the project as ably as any non-federal operator. Petitioner, however, maintains that any non-federal operator, because it intends to make a profit, would probably not perform unremunerative aspects of the project's operation as well as the federal government, that no evidence to negative this proposition was presented, and that the case should be remanded so that evidence in support of this proposition can be introduced. The questions presented are:

1. Where the petitioner seeks reversal on the ground that additional evidence should be received respecting the alleged benefits of federal development, but where he has never described such evidence except in the most general terms either to the Commission, to the lower court, or to this Court, should the case be reopened?

2. Under section 7(b), is the Commission authorized to recommend federal development on the ground here urged by petitioner—that federal development is inherently preferable to non-federal development because the federal government is not actuated by the profit motive?

3. In view of the absence of standards in section 7(b) and in view of the fact that the Commission's determination not to recommend federal development does not preclude petitioner from requesting, or the Congress from authorizing, federal development, is the Commission's determination reviewable?

Statute Involved

The Federal Power Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 791a *et seq.*, provides in pertinent part:

Section 7(b) (16 U.S.C. 800(b)):

> Whenever, in the judgment of the Commission, the development of any water resources for public purposes

should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

Section 10 (16 U.S.C. 803):

All licenses issued under sections * * * 795–818 * * * of this title shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the projects works before approval.

* * * * * * *

Statement

For the most part, petitioner sets forth his version of the critical facts in connection with his argument rather than in his statement of the case, presumably because his argument turns principally upon the facts. Accordingly, since in general petitioner's description of the history of this litigation is accurate, we accept it and defer to the argument portion

of our brief a discussion of the facts central to the questions raised by petitioner.

There is one aspect of petitioner's statement of the background facts that we cannot accept, however—his version of the treatment accorded him by the Commission. The overall impression that is, we think, conveyed by his brief is that the Commission improperly thwarted numerous efforts by him to introduce evidence relevant to section 7(b). Thus, for example, petitioner states: "Repeatedly, after the hearings were closed, the Secretary of the Interior requested that the proceeding be reopened for further consideration whether the High Mountain Sheep project should be developed by the federal government. His submissions raised numerous factual issues on which the existing record was completely silent. Yet, the Commission limited his participation to argument and refused to conduct any further evidentiary hearing" (Br. pp. 11-12).

In point of fact, as we now show, the Commission was tolerant to a fault of the Secretary's procrastination and granted every procedural request he made except his final—and only—request on petition for rehearing that the record be reopened to permit him to introduce evidence. That request was quite properly denied.

Although the Commission had asked petitioner in October of 1959 to submit his comments on Pacific Northwest Power Company's application (R. 236-238),[1] and, some months later, asked for a reply "as soon as possible" (R. 277-278), it was not until after the hearings had commenced, and some thirteen months after the Commission's initial request, that the Secretary responded (R. 126-136). In this response, he did not suggest the need for federal construction of the High Mountain Sheep dam. Rather, he took the position

[1] "R." references are to the joint appendix in the court below (Volumes I-III of the record in this Court). "IV R." references are to Volume IV of the record in this Court.

that there was no immediate need for the project and that it should be deferred "for some years to come" pending further research into methods of handling anadromous fish. The Secretary's letter was placed in evidence, but the hearing continued.

Next, on March 25, 1961, some four months later, petitioner revoked permission he had previously granted to Department of Interior personnel to appear as witnesses in the proceedings and requested that the Commission recess the hearings until the Department completed a "crash program" to study fish passage devices (R. 138-140). The suggested recess was until the end of 1964, a delay of almost three years. Thus, almost three years after Pacific Northwest had filed its application, petitioner had yet to suggest the possibility of a section 7(b) recommendation for federal development and was of the opinion that another three years should elapse before the construction of any project should even be considered.

Petitioner did not raise the question of federal development until June 28, 1962, some four and one-quarter years after commencement of the proceeding and nine and one-half months after the hearing had been concluded (R. 309-313). In his letter of that date, petitioner did not suggest that the hearing be reopened for the taking of evidence. He asked only that the Commission consider the arguments outlined in his letter. The Commission *sua sponte* ordered the record reopened for the purpose of including the letter —a step petitioner now seems to criticize on the rather puzzling ground that the letter "had not been intended as evidence" (Br. p. 17 n. 3)—and also directed the examiner to consider the petitioner's statement and additional briefs of the parties with respect thereto (R. 314-315).

As to the next document filed by petitioner, his petition to intervene after the examiner's decision, he now says that he "raised a number of fundamental factual

issues" but that the "Commission declined to explore these issues in a further hearing, expressly limiting the Secretary's participation to the filing of exceptions to the examiner's decision and participation in oral argument before the Commission" (Br. pp. 22-23). The implication seems to be that petitioner sought, but was denied, the opportunity to introduce evidence in a reopened proceeding. That implication is incorrect. Petitioner did not request a further hearing, did not request that the record be reopened, and did not state that relevant evidence existed *dehors* the record that should be considered. Petitioner requested only (i) that he be made a formal party (R. 513, 517) and (ii) that a 60-day extension of time be granted for him to file exceptions to the examiner's opinion (R. 520). The Commission granted petitioner exactly what he requested (R. 521-523).

Again in petitioner's exceptions to the examiner's report —not referred to in petitioner's brief in this Court—petitioner did not proffer any evidence respecting federal development. He did vigorously assert that the record was faulty, but only because it did not reflect the fact that a number of dams had been authorized for construction after termination of the hearing—a development petitioner thought revelant to his contention that there was no need for High Mountain Sheep (R. 543, 591-595). Petitioner asked that the Commission take judicial notice of that fact, and the Commission did (R. 613).

Finally, petitioner now concedes that, in his last submission—his petition for rehearing of the Commission's decision—he "perhaps . . . might have been more specific in his proffer of evidence" (Br. p. 24). Indeed, while the petition contained a most general request for "reopening of the record in order to allow the introduction of evidence regarding river operations without coordination and under varying types, modes, and degrees of coordination" (R.

737), petitioner's prayer contained only a request for reopening so that evidence could be introduced respecting "the changed circumstances relating to the need for the construction of the project and the changed power resources of the region . . ." (R. 747-748).

This, then, is the full story of how, as petitioner's brief puts it, "[R]epeatedly . . . the Secretary of the Interior requested that the proceeding be reopened" (Br. pp. 11-12) —a single request on petition for rehearing that the opportunity be given him to introduce evidence—a request that petitioner now concedes "might have been more specific" (Br. p. 24).

Moreover, petitioner has also been rather less than constant in his legal theories respecting federal development. Thus, before the Commission, his counsel acknowledged that the Commission had "practically unlimited discretion" under section 7(b) in an ordinary case, but that in this case the Commission had no discretion whatever because the Congress, by authorizing the dams downstream from High Mountain Sheep, had preempted the High Mountain Sheep site for federal development (R. 48-49). That was also petitioner's primary argument in the Court of Appeals. In his petition for certiorari, however, petitioner expressly repudiated that argument: "We do not argue that congressional authorization of the downstream federal projects pre-empted the Commission's authority to license High Mountain Sheep for private development" (p. 16). Instead, he rested upon the contention that "the Commission has an independent and affirmative responsibility to gather evidence on issues affecting the public interest" (p. 12), a contention he asserted warranted review because of its general importance. The briefs in opposition made it quite plain that the Commission did not question the principle

advanced by petitioner. Petitioner now switches to the contention that the *applicant* has the burden of *disproving* the desirability of federal development—a principle, moreover, that he states is conceded by counsel for the Commission, so that the only question remaining is "whether it was honored by the Commission in this proceeding" (Br. pp. 10-11).

We do not, by the foregoing recitation, mean to suggest that the public interest should be sacrificed in any respect because of the manner in which petitioner has proceeded. What we do mean to suggest is that petitioner cannot justly complain about the way in which the Commission managed its procedures to accommodate him, and also that petitioner's representations in this Court respecting the availability of additional evidence important to the section 7(b) determination should be examined carefully in light of petitioner's utter failure to produce or describe any such evidence either before the Commission or in the lower court.

Argument

INTRODUCTION AND SUMMARY

The High Mountain Sheep dam will be an important project, as petitioner says.[2] Accordingly, when Pacific North-

[2] But not quite as colossal as such phrases as "inestimable benefit to the people" (Br. p. 33) would suggest. While High Mountain Sheep is a large storage project, it is by no means unique. There are 27 existing storage projects whose storage operations are coordinated by the Pacific Northwest Coordination Agreement. Storage projects above the federal dams downstream already provide for 12,428,000 acre feet (IV R. 243, line 19), of which 2,215,000 acre feet are already under license (Flathead Lake and Brownlee). Dworshak dam is under construction by the Corps of Engineers (1,430,000 acre feet, IV R. 247); and the Canadian Treaty dams plus Libby are also under construction, adding 18,000,000 acre feet (IV R. 277). Thus, total storage assured in the basin without High Mountain Sheep is in excess of 31,861,000 acre feet. On the Snake River alone, there are over 7,000,000 acre feet of storage above High Mountain Sheep. Brownlee (1,000,000 acre feet) and Dworshak (1,430,000 acre feet), both "Lower Snake" storage dams as the petitioner apparently uses that term, total

west sought its license, it was faced with the heavy burden of establishing that its proposal would meet the standard of section 10(a) of the Federal Power Act—that is, that it would be the project "best adapted" to realize all of the potentialities of the High Mountain Sheep dam site. Petitioner does not dispute that, by its efforts to carry that burden, Pacific Northwest succeeded in proving that its proposed facility is the one "best adapted" to producing the maximum benefits obtainable in terms of power, flood control, navigation, and all other benefits of a multi-purpose project. Indeed, petitioner expressly concedes that the facility that would be built by the federal government, if the Congress authorized it, would in all probability be substantially identical to the facility proposed by Pacific Northwest (Br. p. 19). Nor does petitioner suggest that Pacific Northwest would not operate the facility in as effective a fashion as any other non-federal operator.

But petitioner does say that this is not good enough, because there is no evidence in the record proving that the federal government would not operate the identical facility better than any non-federal operator. In this brief, we

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2,430,000 acre feet, which exceeds High Mountain Sheep storage of 2,250,000 acre feet, and raises a question as to what petitioner has in mind in suggesting that High Mountain Sheep would "more than triple" storage on the Lower Snake (Br. p. 33).

The benefits from use of storage at High Mountain Sheep bear out the fact that this is one more storage facility among many. After the Canadian treaty dams are completed, storage at High Mountain Sheep will contribute 53,000 kilowatts of prime energy at the downstream dams (prime energy generation at site will be 513,000 kilowatts) (IV R. 365), which is scarcely overwhelming when compared with the overall total generation at the nine downstream dams of 4,076,000 kilowatts of prime energy (IV R. 247).

Flood control benefits of High Mountain Sheep will be approximately $240,000 annually, according to the Corps of Engineers (R. 75). All other "benefits" of High Mountain Sheep are estimated by the Corps of Engineers at $29,0000 annually (IV R. 299—"Plan 4"). Power benefits at-site and downstream of High Mountain Sheep will be not less than $28,814,000 annually (IV R. 371).

show that petitioner's contentions are not well-founded for the following reasons:

1. On any standard of judicial review petitioner has not made a case. His assertion that the record before the Commission contained no evidence relevant to federal development is quite incorrect. There is a mass of evidence establishing that Pacific Northwest's proposed project is best designed to serve every public purpose mentioned by petitioner. Since petitioner evidently agrees that the federal government could not construct a better dam, surely this evidence is relevant to whether the license should be denied to Pacific Northwest in favor of federal development. Moreover, every argument made in this Court in favor of federal development was pressed by petitioner upon the Commission in even more detail than appears in his brief here. Finally, petitioner does not in this Court describe the additional arguments he could make, or the additional evidence he could introduce, upon remand.

2. Petitioner's basic contention—that federal development of High Mountain Sheep would be preferable because the profit motive of a private operator would make the optimum achievement of public purposes less likely—would not be cognizable by the Commission even if in some fashion evidence relating to that contention could be secured. If the Commission accepted this argument in favor of federal development, it would be obliged to deny a private license on any major hydroelectric project, for any major project will have a nonpower function, such as flood control, navigation, and recreation. But the Congress did not in section 7(b) intend that the Commission intrude into the continuing controversy whether private or federal development is *per se* superior. The resolution of that controversy requires the exercise of an essentially legislative judgment. The Congress knew quite well how to express a preference for one

kind of builder over another, as it did in the provision of the Act granting a preference to public power applicants. The Congress did not accord such a preference to the federal government. Indeed, the primary purpose of the Federal Power Act was to encourage the investment of private capital in multi-purpose hydroelectric projects, as both the legislative history of the statute and the licensing provisions of section 10(a) show. Accordingly, it would be incongruous to conclude that the Congress intended to delegate to the Commission the authority to confer a preference to the federal government under the guise of a section 7(b) determination.

3. Entirely apart from the foregoing considerations, an independent ground supports the Commission's determination—the Commission's finding as to the urgent need for construction of the High Mountain Sheep dam, coupled with the improbability of speedy federal construction. This consideration is relevant under section 7(b). *Chapman* v. *Federal Power Commission*, 345 U.S. 153, 169. And, until his petition in this Court, petitioner never suggested that in point of fact the federal government would undertake construction promptly—his view was that the High Mountain Sheep dam simply was not needed. Now petitioner says that the record is "stale" because he has changed his mind respecting the need for High Mountain Sheep. But he does not represent either that the Bureau of the Budget is prepared to request appropriations for High Mountain Sheep or that he has any reason to believe that the Congress would enact the necessary legislation. In these circumstances, petitioner should not be permitted to block a final decision by the Commission merely on the basis of his change of mind. Rather, he should be required to secure action from the Congress, the body that is the ultimate arbiter of the merits of his position.

4. Finally, the issues raised by petitioner are not reviewable at all. In section 7(b), the Congress did not intend to impose upon the Commission an obligation that would be enforced by the courts. Rather, the Congress intended that the Commission would be responsible only to it. That is demonstrated by the language of section 7(b)—"in the judgment of the Commission"—which establishes no standards whatever by which judicial review can be guided. In addition, it is demonstrated by the character of the Commission's determination under section 7(b)—if in favor of federal development, it obliges neither the Executive to recommend legislation nor the Congress to consider it, and if against development, it forecloses neither the Executive from recommending preemptive legislation nor the Congress from enacting it. It should not be presumed that the Congress intended this Court to sit in judgment on an agency decision which affects federal interests in such a marginal fashion.

I. THE CASE RESPECTING FEDERAL DEVELOPMENT MADE BEFORE THE COMMISSION WAS COMPLETE

Petitioner's argument rests upon the assertions that the proceeding before the Commission was "barren of evidence" respecting the question of federal development of High Mountain Sheep (Br. p. 24); that relevant evidence does exist and could have been introduced; and that, accordingly, the Commission's order should be set aside and the case remanded so that the Commission can act upon a complete record. Petitioner's assertions are baseless. The record includes substantial, indeed voluminous, material relevant to federal development; petitioner does not establish that any other evidence was, or would now be, available; and the Commission's analysis of the data before it was wholly reasonable.

A. *A Mass of Data Relevant to Federal Development Was Introduced by the Parties.*

Under the exacting standards of section 10(a), 16 U.S.C. 803(a), Pacific Northwest was required to show, and the Commission to find, that the project licensed "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including recreational purposes. . . ." Accordingly, Pacific Northwest was required to introduce evidence demonstrating that its project would develop to the utmost all of the beneficial uses of the waterway on which the project would be located, including each of the "uses" identified by the Secretary as of prime importance—power, coordination, fish preservation, flood control, navigation, and recreation.

That is precisely what Pacific Northwest did by way of extensive oral and documentary evidence that the plant it plans to erect will produce, in conjunction with all other existing and possible future federal and non-federal projects in the entire Columbia River system, the maximum energy that such a coordinated system is capable of generating;[3] that the High Mountain Sheep project will provide downstream flood control in accordance with the requirements of the Corps of Engineers;[4] that the project will

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[3] The references to the record in this and the following four footnotes are illustrative of the mass of testimony and exhibits that were presented to the Commission. As to power, see testimony of K. M. Robinson, Chairman of the Board of Pacific Northwest, R. 6-7, IV R. 18-19, 130-132, 134-136; testimony of A. E. Alspaugh, engineer in charge of High Mountain Sheep studies, IV R. 27-34, 37-38, 172-173; testimony of Charles C. Bonin, designer of High Mountain Sheep, IV R. 26-27; Pacific Northwest Exhibit 18, R. 69-71, IV R. 242-254; Joint Exhibit, R. 305-307, IV R. 350-352, 359-369.

[4] Testimony of Robinson, IV R. 19, 132, 137; testimony of Alspaugh, IV R. 34-36, 167-171, 177; Pacific Northwest Exhibit 6, R. 59-61.

provide whatever downstream flows are necessary for navigation; [5] that the project will incorporate the best available fish passage facilities that the state and federal fish agencies can devise; [6] and that the project will maximize the site's recreation potential as conceived by the Forest Service.[7] In short, the evidence established that the project proposed by Pacific Northwest will produce maximum power, maximum coordination, maximum flood control, maximum navigability, maximum recreation opportunities, and minimum damage to fish.[8]

Even if a 29,000 page record—for much of the record was devoted to these questions—could be summarized in the compass of a brief, there is no point in describing this evidence in any detail, for the existence of the evidence is not in dispute, but only its relevance.

It is difficult to perceive how petitioner can suggest any doubt as to the relevance of this evidence to the question of federal development. Its relevant character is clear from, if nothing else, the contentions that petitioner did

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[5] Testimony of Alspaugh, IV R. 36-37, 149-152, 175; Pacific Northwest Exhibit 6, R. 58-62.

[6] Testimony of Robinson, IV R. 25-26, 133; Pacific Northwest Exhibit 5, IV R. 272, 274-277; Letter from Pacific Northwest to FPC, September 23, 1959, IV R. 329-332.

[7] Testimony of Robinson, IV R. 19-21; testimony of Alspaugh, IV R. 136-137; Pacific Northwest Exhibit 8, IV R. 220-241.

[8] The record, of course, also contains voluminous evidence presented by the competing applicant. While this evidence was designed to prove that applicant's project to be "best," in many important areas it supported Pacific Northwest's evidence. Where conflicts existed, this in itself was an aid in the Commission's evaluation of the evidence. In addition, the Staff and intervenors introduced substantial evidence on public purpose issues. See *e.g.*, Testimony of O. W. Hurd, R. 10-12; testimony of R. B. Gallup, R. 12-13, IV R. 45-61, 182-195; testimony of A. J. Meadoweroft, IV R. 93-129; Washington Public Power Supply System Exhibits 268, 293, 296, 313-319, and 321, R. 99-120; Commission Exhibit 37, R. 121-125; Program and Order of the State Water Resources Board of the State of Oregon, IV R. 6-15; H.Doc. No. 403, 87th Cong., 2d Sess. (1962), IV R. 289-320.

not make before the Commission and is *not* making in this Court.

Thus, for example, petitioner has never urged that the design of the proposed dam, whether in terms of engineering or size, fails fully to serve the purposes of coordination, navigation, flood control, conservation, or recreation, and that the federal government, untroubled by the profit motive, would correct the deficiencies. Indeed, petitioner concedes that "any federal project at the site would doubtless be similar, if not identical, in its structure . . . " (Br. p. 19). Nor does petitioner argue that the site of the dam is inappropriate. Indeed, that site, as opposed to the Nez Perce site, was dictated primarily by one of the public interest factors emphasized by petitioner—the desirability of preserving the fish runs on the Salmon River. See generally our brief in No. 462. Nor does petitioner contend that Pacific Northwest's evidence respecting the power advantages to be gained system-wide by coordination, or respecting the manner in which storage will be operated for flood control, or any of petitioner's other evidence respecting operation of the project, is faulty.[9] But surely evidence

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[9] Probably because of the massive and highly technical character of the record, there are a number of errors of fact in petitioner's brief that, on the whole, are minor. One error, however, is significant—petitioner's assertion that Pacific Northwest proposed to provide something less than full coordination of High Mountain Sheep with the Columbia River System (Br. pp. 20-21). That is not true. Evidently, counsel for petitioner have been misled by the fact that a witness for Washington Public Power Supply System employed an idiosyncratic selection of terms. Pacific Northwest provided power studies based on an operation to produce the maximum firm load carrying capability and maximum usable secondary energy in the region as a whole (IV R. 30). This operation has been referred to, in testimony and briefs (and government reports, IV R. 306), somewhat generally as "coordination." The Washington Public Power Supply System's witness, however, elected to call Pacific Northwest's type of operation "ultimate integrated operation" (IV R. 195), a term not

that forecloses arguments in favor of federal development as against private development is no less relevant to section 7(b) than evidence that supports arguments in favor of federal development.

B. *Petitioner's Submisions to the Commission Substantially Contributed to the Record.*

Petitioner's first statement on High Mountain Sheep (R. 126-136), submitted some thirteen months after the Commission had formally requested the petitioner's views, said nothing whatever about federal construction. Rather, he took the position that, because in his view sufficient power would be available in the Pacific Northwest for at least five or six years, any project should be deferred "for some years to come" pending further research into methods of handling anadromous fish. Recognizing, however, that the Commission might not follow this course, petitioner recommended that, if the project were constructed by Pacific Northwest, it "should be fully integrated and coordinated electrically and hydraulically with the Northwest Power Pool through the Bonneville Power Administration transmission grid" (R. 134). Petitioner did not suggest that such coordination would be unobtainable because Pacific Northwest was a private utility.

About four months later, on March 25, 1961, petitioner revoked permission previously granted to Department of Interior personnel to appear as witnesses in the proceeding and requested that the Commission recess the hearings for another three years until the Department completed a "crash program" to study fish passage facilities

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in common use (IV R. 194). What he termed "coordinated operation" was something less (IV R. 189, 361). Thus, the suggestion in petitioner's brief that operation of High Mountain Sheep by Pacific Northwest will provide 60,000 kilowatts of prime energy, while federal operation will provide 171,000 kilowatts, is incorrect. Operation by Pacific Northwest will produce 171,000 kilowatts (IV R. 359).

(R. 138-140). There was again no hint that federal construction was desirable.

One more year later, petitioner, on June 28, 1962, for the first time advised the Commission that the Department of Interior believed the High Mountain Sheep dam should be built by the United States (R. 309-313). While that submission was the briefest petitioner was to make, in it he advanced virtually every argument in favor of federal development that has ever been made either to the Commission or to this Court, and in it he marshaled every specific fact in favor of federal development that he has ever mentioned. Thus, for example, as to coordination, he pointed out that all of the dams downstream from High Mountain Sheep are federally owned; that when completed "they will have a total head of nearly 900 feet . . . and an installed capacity of more than 5,900,000 kilowatts"; and that the High Mountain Sheep dam "with 2,000,000 acre-feet of storage . . . would increase the prime generation of the downstream projects by nearly 1,700,000 kilowatt-hours annually" if there were proper coordination (R. 310). As to fish, petitioner asserted that the federal government would more quickly employ the products of advancing technology. Moreover, petitioner argued that the loss of power at High Mountain Sheep that might be caused by the necessity of insuring navigability and controlling floods could be compensated for at the downstream federal dams.

While petitioner made this submission after the record had closed and the hearing had terminated, he did not request that the record be reopened nor did he intimate in any way that additional evidence was necessary to support his arguments. Rather, he evidently considered that those arguments could properly be evaluated on the basis of the undisputed facts. Had he considered otherwise, it surely would not have been difficult for him to add half a dozen pages to his submission summarizing the factual evidence

that he believed would give weight and content to his assertions.

The Commission reopened the record for the purpose of admitting this submission by petitioner. The Commission also authorized the parties to file supplemental briefs respecting petitioner's contentions and commanded the examiner to consider those contentions (R. 314-315). Accordingly, the parties and the Commission staff filed extensive briefs, all of which opposed federal development and analyzed in detail each of petitioner's contentions.

After the examiner found against petitioner (R. 315-491), petitioner filed a petition for intervention (R. 494-514) and thereafter filed exceptions to the examiner's report (R. 523-605). In those documents, in 100-odd pages, petitioner elaborated upon the arguments set forth in his prior letter. While no new relevant facts were asserted and no new contentions were advanced, petitioner did develop with more clarity the theme that his brief in this Court pursues with vigor—the "intrinsic" inferiority of non-federal development that assertedly arises from the fact that the non-federal operator wants to make money. Thus, for example, petitioner asserted: "The difficulties which separate the Federal Government and a nonfederal owner are totally different. They arise from an inherent conflict between public needs and the quest for private profits" (R. 601).[10]

These then, were the considerations urged upon the Com-

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[10] He also stated that flood control, fish passage facilities, and recreational development are "burdens upon the primary purpose for which PNPC [Pacific Northwest] would operate the project—the production of power" (R. 575); that "the Commission must recognize that a nonfederal entity which seeks to improve a river primarily for power furnishes non-power benefits to the public on a limited basis, whereas the United States continually seeks to obtain the maximum development physically possible" (R. 578); that a license to Pacific Northwest "would place crucial facilities and operations under an entity primarily concerned with an inconsistent purpose—the production and sale of electric power" (R. 581); and that "it must be apparent that, in the public interest, the dam and reservoir . . . cannot be

mission in favor of federal development—considerations that rested partly upon policy and partly upon basic facts. These facts, such as the existence and character of the dams on the Columbia River System, the investment of the federal government in a number of those dams, the storage capacity of the proposed High Mountain Sheep development and the relationship between that capacity and the requirements of coordination with other dams, were either specifically in the record or else so indisputably true that the Commission could take them into account without a formal proffer. The Secretary's submissions, together with the evidence introduced by others that has been outlined in the preceding portion of this brief, surely produced a record with respect to the section 7(b) question that cannot fairly be characterized as "barren of evidence" (Br. p. 24).

C. *Petitioner's Contention That the Record Was Incomplete is Unfounded.*

The next question is whether the Commission should have required that the record be supplemented in some significant fashion. Petitioner maintains that the Commission should have; but, as we now show, petitioner's argument is meritless.

It is conceded by petitioner that the evidence establishes that the location and design of Pacific Northwest's proposed dam are unexceptionable in terms of serving the various interests—*e.g.*, fish protection, coordination, flood control—stressed by petitioner.[11] Certainly in other circumstances there could be a sharp conflict of evidence respecting such matters. But there is none here.

Nor is there any dispute respecting the physical opera-

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turned over to a nonfederal entity whose interest lies in the exploitation of public hydropower resources for its own use and benefit and not in recreation" (R. 590).

[11] "[A]ny federal project at the site would doubtless be similar, if not identical, in its structure . . ." (Br. p. 19).

tions that are necessary in order to achieve full coordination of High Mountain Sheep with the other hydroelectric projects in the Columbia River System. This is also true respecting the engineering testimony as to the manner in which the dam could and should be operated for flood control and navigation.

Similarly, petitioner does not suggest that the fish passage facilities that would be installed by Pacific Northwest would be inadequate in any respect. This is, of course, a subject as to which, in other circumstances, there could be controversy. But there is none here.

Nor does petitioner intimate that in the past any of the four companies controlling Pacific Northwest, each of which has for some time operated hydroelectric projects in the Columbia River System, has defaulted in any respect in meeting its responsibility to secure the public interest. This is hardly surprising, since the Commission, which is, of course, familiar with the record of performance of these companies, specifically found that their "record of cooperation is good" (R. 668). Once again, in a different case the applicant's record of past performance might argue in favor of federal development. But not here.

And, finally, petitioner does not now suggest that the conditions of the license designed to assure that the licensee will promote the public interest could be improved.

In sum, this is a case in which the evidence establishes, and petitioner does not deny, that if Pacific Northwest were to construct and operate High Mountain Sheep the impact upon the public interest would be as salutary *as could possibly be anticipated from private ownership.* Petitioner's case rests entirely upon the contention that, notwithstanding the unchallenged standing of Pacific Northwest as among private companies and the unquestioned merits of its proposed project from a physical viewpoint, federal operation of that project would be inherently superior because it

would produce no conflict between the profit motive and the performance of unremunerative public functions—as petitioner says at least five times in the course of three pages (Br. pp. 34-36). As petitioner put it in his brief below (p. 12), it is "inherently incredible" that a private power company would act in any way that diminished its profits.[12]

In view of the character of petitioner's contention—which he himself characterizes as a *prima facie* argument (Br. p. 13)—it is difficult to imagine what evidence could be introduced in its support. Furthermore, if by any chance it were true that federally operated projects in general perform admirably in terms of coordination, fish protection, flood control, and navigation, whereas privately operated projects in general are markedly inferior, this would be precisely the sort of knowledge relating to project operations that the Commission would possess as part of its general expertise and that petitioner would possess because he is an operator of hydroelectric dams and power systems throughout the West.

But, with a single exception we discuss below, petitioner does not represent that any specific evidence of this type exists, much less describe or proffer it. Instead of describing the evidence he would produce on remand, petitioner speaks of a "searching inquiry into the adequacy of the conditioning technique" (Br. p. 16), or claims that his allegations respecting coordination "should have been tested and explored with the aid of expert testimony" (Br. p. 22), or asks for "a factual comparison of the efficacy of these alternative methods of promoting maximum utilization of the water resource" (Br. p. 28), or refers to the improbability that a private company would effectively dis-

[12] "It is inherently incredible that a private power company, whose interest in its own hydroelectric power sales is by nature inimical to all other competing uses for water, could be relied upon to manage and protect the great variety of public interests involved here as effectively as the Government."

charge such functions as flood control, fish preservation, and operation for navigation.

This is precisely the sort of generalized complaint that petitioner made to the Commission in his petition for rehearing and to the court below. The lower court observed in response that petitioner "has no cause to complain that he was not permitted to introduce evidence which he has not proffered or described" (IV R. 387). And even petitioner now concedes that "he might have been more specific in his proffer of evidence" (Br. p. 24). But this concession is not coupled with any making of amends in this Court. Surely, this cannot be an oversight on petitioner's part. Not only was he put on notice by the lower court as to the desirability of specificity—assuming that notice was necessary—and not only does petitioner confess the inadequacy of his prior submissions, but, as we have pointed out, if any one other than the Commission is familiar with the evidence respecting the performance of hydroelectric projects, it must be petitioner.

As we have noted, there is one exception to petitioner's want of precision—his statement that "in an evidentiary hearing the Secretary of the Interior would attempt to show, citing the example of Brownlee on the upper Snake . . . that efforts at agreement with non-federal storage dams in the region have not always been fruitful" (Br. pp. 27-28). But, assuming that petitioner could prove that the operator of Brownlee, Idaho Power Company, had been recalcitrant in effecting coordination, surely this would be of the most distant relevance to the question as to how Pacific Northwest, an entirely different licensee with no corporate connection with Idaho Power Company, would perform under a license for High Mountain Sheep. In any case, the Brownlee controversy was called to the Commission's attention by petitioner, who noted that the problem was the subject of a formal Commission proceeding (R. 727, 735). Accordingly,

it is difficult to perceive how petitioner could tell the Commission anything about Brownlee that it does not already know.

In sum, petitioner has not met the burden of demonstrating that a further hearing would produce significant additional evidence relevant to section 7(b). And surely that burden must be met in a case where the Commission has found that there is an immediate need for construction of the dam, where the licensee has spent a very large amount of time and money in perfecting his plans, and where no one suggests any flaw in those plans other than the fact that the licensee is a private company. In these circumstances, the order of the Commission should not be set aside.

D. *The Commission's Evaluation of the Evidence Relevant to Section 7(b) Was Reasonable.*

Not only did the Commission have before it evidence amply sufficient for an informed section 7(b) judgment, but its judgment was in fact quite reasonable. The Commission's basic approach to the section 7(b) issue was that its "decision must rest upon an evaluation of all the factors relevant to the development on this reach of the Snake at this time" (R. 666). In making that evaluation, the Commission considered and unanimously rejected each of the contentions then, and now, advanced by petitioner.

As to coordination, the Commission recognized that "notable results" could be achieved by the proper operation of the project (R. 785). Surely, in view of the Commission's unqualified and explicit adoption of petitioner's statements respecting the importance of coordination,[13] it could not be

[13] "We, like Interior, recognize that 'coordination may permit storage of water in one party's reservoir for the benefit of another. It may permit an exchange of winter energy from one system for summer energy of another thereby increasing the firm capabilities of both systems. It may reduce the requirement of reserve capacity to the benefit of both systems. It may permit the joint use of transmission facilities or the exchange of

said that the Commission failed to appreciate the significance of the problem. In addition, the Commission, of course, was aware that the interests of the United States would be directly affected by the operation of High Mountain Sheep, since "there are nine federal projects, authorized or constructed on the Snake and Columbia Rivers downstream from the projects here proposed . . ." (R. 665).

Nonetheless, the Commission concluded that federal development would not better assure coordination than development by Pacific Northwest. On the basis of the evidence introduced by Pacific Northwest and, as we have noted (*supra*, p. 15), not controverted then or now by petitioner, the Commission was able to begin with the proposition that there was no deficiency in the proposed engineering of High Mountain Sheep. As the Commission said, "PNPC has designed its project to be operated and co-ordinated with the Northwest Power Pool in order to benefit all members" (R. 668). As to petitioner's contention that coordination among all affected projects would be best assured under single ownership, the Commission agreed; but the Commission pointed out that this was beside the point, since the Columbia River System "already has a number of different project operators . . ." (R. 667-668).[14] See the map facing this page showing federal and non-federal projects in

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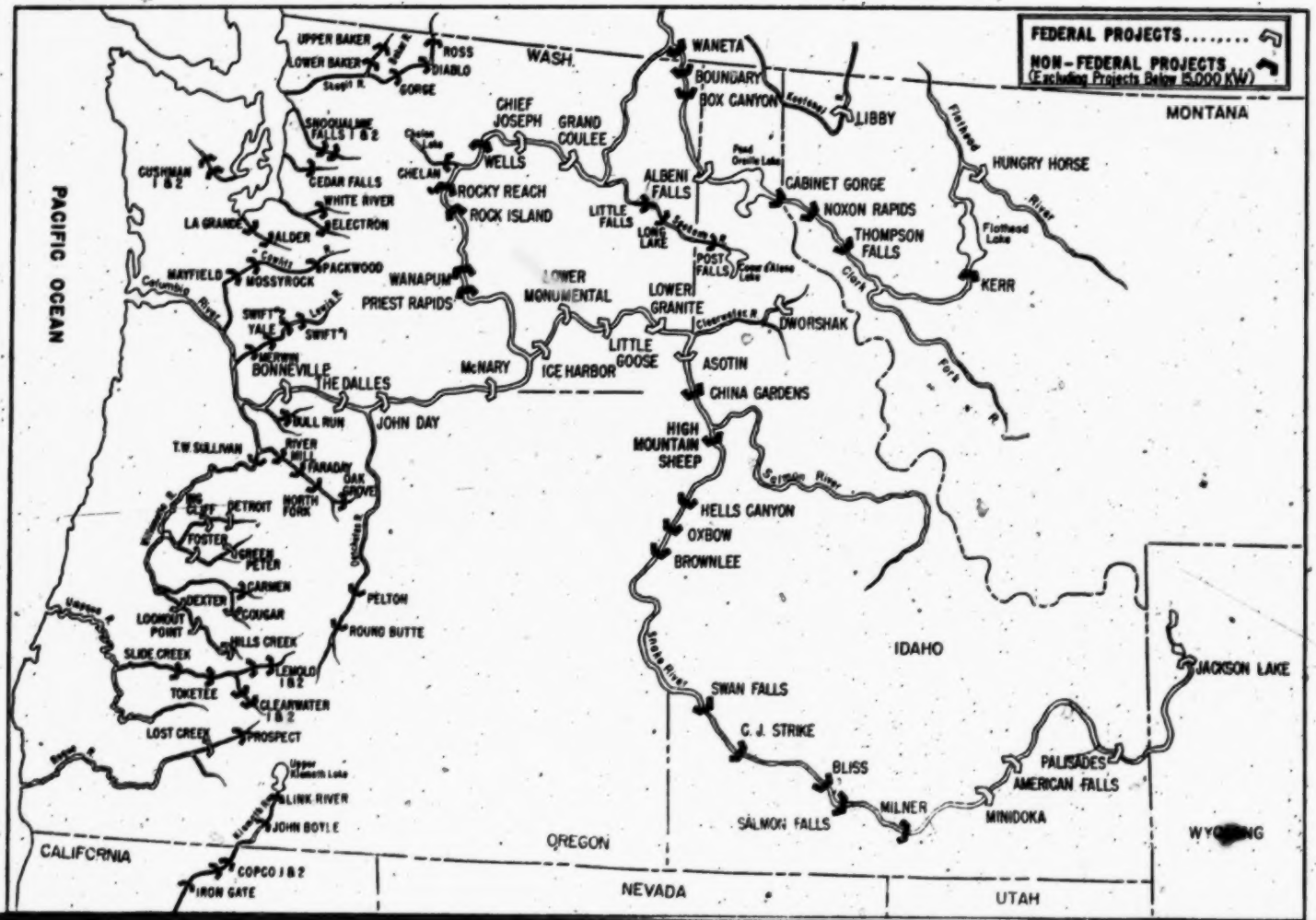
energy between systems, so as to reduce transmission requirements.' In addition, coordination may include the planning of new generating resources and scheduled maintenance and the sharing of resources" (R. 785) [footnote omitted].

[14] Petitioner's version of the relevant sentence in the Commission's opinion radically changes its meaning. Petitioner asserts that Commission conceded "that *the Secretary* normally would have a superior ability to co-ordinate the operations of HMS with the other affected projects on the river" (Br. p. 25) (emphasis supplied). What the Commission in fact said was: "We agree that the Secretary (*or any single operator*) normally would have a superior ability to co-ordinate the operations of HMS with the other affected projects on the river" (emphasis supplied) (R. 667). The difference goes to the heart of petitioner's case.


FEDERAL PROJECTS.....
NON-FEDERAL PROJECTS
(Excluding Projects Below 15,000 KW)
PACIFIC OCEAN
WASH.
MONTANA
IDAHO
OREGON
CALIFORNIA
NEVADA
UTAH
WYOMING
UPPER BAKER
LOWER BAKER
ROSS
DIABLO
GORGE
SKAGIT R.
SNOQUALMIE FALLS 1 & 2
CUSHMAN 1 & 2
CEDAR FALLS
WHITE RIVER
ELECTRON
LA GRANDE
ALDER
MAYFIELD
MOSSYROCK
PACKWOOD
Cowlitz
Columbia River
SWIFT 1
YALE
SWIFT 2
Lewis R.
MERWIN
BONNEVILLE
THE DALLES
BULL RUN
JOHN DAY
T.W. SULLIVAN
RIVER MILL
FARADAY
OAK GROVE
NORTH FORK
DETROIT
BIG CLIFF
FOSTER
GREEN PETER
SCHEELINE R.
DEXTER
CARMEN
COUGAR
LOOKOUT POINT
HILLS CREEK
PELTON
ROUND BUTTE
Willamette R.
SLIDE CREEK
LEMOLD 1 & 2
TOKETEE
CLEARWATER 1 & 2
LOST CREEK
PROSPECT
Rogue R.
Upper Klamath Lake
LINK RIVER
KLAMATH R.
JOHN BOYLE
COPCO 1 & 2
IRON GATE
CHIEF JOSEPH
GRAND COULEE
Chelan Lake
CHELAN
WELLS
ROCKY REACH
ROCK ISLAND
WANAPUM
PRIEST RAPIDS
LOWER MONUMENTAL
McNARY
ICE HARBOR
LITTLE GOOSE
LOWER GRANITE
Clearwater R.
DWORSHAK
ASOTIN
CHINA GARDENS
HIGH MOUNTAIN SHEEP
Salmon River
HELLS CANYON
OXBOW
BROWNLEE
Snake River
SWAN FALLS
C. J. STRIKE
BLISS
MILNER
SALMON FALLS
WANETA
BOUNDARY
BOX CANYON
Kootenai R.
LIBBY
Pend Oreille Lake
ALBENI FALLS
LITTLE FALLS
LONG LAKE
Spokane R.
POST FALLS
Coeur d'Alene Lake
CABINET GORGE
NOXON RAPIDS
THOMPSON FALLS
KERR
Clark Fork R.
Flathead R.
HUNGRY HORSE
Flathead Lake
PALISADES
AMERICAN FALLS
MINIDOKA
JACKSON LAKE

the Northwest Power Pool.[15] Moreover, the granting of the license to Pacific Northwest would not introduce a complete stranger with whom coordination would have to be secured, since "[t]he parties comprising PNPC [Pacific Northwest] are among those having projects on the river" (R. 668). Also highly relevant was the consideration that there is "an existing coordination system, i.e., the Northwest Power Pool" (R. 668); which had been notably strengthened by the binding and more specific Pacific Northwest Coordinating Agreement—an agreement, the Commission noted, "to which Interior . . . PUD's and private power companies are parties" (R. 786).[16] Nor could it be suggested that Pacific Northwest would be reluctant to cooperate in making that Agreement effective, for "[t]he parties comprising PNPC [Pacific Northwest] are members of the Pool and their record of cooperation is good" (R. 668).[17] Finally,

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[15] The Pacific Northwest Coordination Agreement has 15 operators including the Chief of the Corps of Engineers; which operates the federal dams. The Chief stated that "The scope of the project and purposes served as proposed by [Pacific Northwest] would be substantially the same as those which I proposed." (R. 59).

[16] Petitioner states parenthetically (Br. p. 27) that in the analysis of existing cooperation and coordination, the Commission went beyond the record. Petitioner does not, however, assert that the Commission erred in this respect. This is the type of knowledge that the Commission acquires in discharging its functions under the Act, and is accordingly a part of the Commission's expertise that it must call into play under section 7(b). Moreover, specific evidence respecting this subject was in fact part of the record. See IV R. 306, 307, 350-352.

[17] While noting that the Coordination Agreement contains a provision that will permit Pacific Northwest to become a party if it constructs the High Mountain Sheep dam, petitioner attempts to raise a doubt as to whether Pacific Northwest will in fact sign the agreement (Br. p. 40). This is wholly unwarranted. Putting aside the fact that the Commission surely would exercise its authority to require Pacific Northwest to enter the Coordination Agreement, petitioner well knows that, as Pacific Northwest represented to the lower court (Br. pp. 21-22): "Immediately after the Commission's Order Denying Rehearing was entered, [Pacific Northwest] made a formal request that [Pacific Northwest] be made a party to this Agreement. . . . [Pacific Northwest] was not permitted to become a party to that agreement *on the objections of the Department of the Interior.* No other party to the Agreement objected to [Pacific Northwest's] executing the Agreement. . . . [Pacific Northwest] proposes to subscribe to the

the Commission emphasized that it had conditioned the license upon a provision requiring that "the licensee shall operate the project in complete co-ordination with the Northwest Power Pool." The Commission observed that it had "continuing jurisdiction and [would] insist that this be done" (R. 668).

The Commission's evaluation of each of the other alleged benefits of federal construction had a similarly solid foundation in the record. As to flood control and navigation, which the Commission noted were "objectives of lesser significance" (R. 666),[18] the Chief of the Army Corps of Engineers, the federal agency with primary jurisdiction, declared that Pacific Northwest's proposed project would serve "substantially the same" purposes as a federal project (R. 58-62). Moreover, Pacific Northwest had committed itself to operate the project for flood control as directed by the Corps of Engineers (IV R. 19). The Commission, following the Chief of Engineers' recommendations, incorporated in Pacific Northwest's license those provisions relating to flood control and navigation that the Chief suggested (R. 666-667).

The force of the recreation claim, as well as that relating to navigation, was already dubious in light of petitioner's admission at oral argument that the non-federal applicants had "done a pretty good job" in those respects (R. 53). The Commission's finding that Pacific Northwest's project "will provide substantial recreational opportunities" (R. 667) is unchallengeable, given the Commission staff's evaluation of the recreational benefits afforded by the rival non-federal projects (R. 353-354), the extensive field report of the Forest Service outlining its views as to the recreation facilities that should be furnished (IV R. 220-241), Pacific Northwest's adoption and improvement of the Forest Service's plans (IV R. 19-20) and the license

Pacific Northwest Coordination Agreement promptly upon conclusion of the judicial process."

[18] See p. 8, n. 2, *supra*.

provision requiring Pacific Northwest to cooperate with all interested governmental agencies in the preparation of a recreation plan and to construct all necessary and desirable facilities (R. 667-668).

As the Commission's opinion indicates, the fish problem was explored as thoroughly and exhaustively as any other issue in this case. (R. 435-437, 506-508, 580-586, 629-640, 667, 681). Indeed, a central question was whether protection of fish required that the dam be placed at High Mountain Sheep, as Pacific Northwest advocated, rather than at Nez Perce, as Washington Public Power Supply System advocated. Moreover, the Commission conditioned the license upon a requirement that the protective devices be constructed and operated as prescribed by the Commission upon the recommendation of the Secretary of the Interior and State conservation agencies (R. 667).

Petitioner apparently believes that Pacific Northwest will fail to carry out the conditions of the license because its profit motive presumptively disables it from performing as well as an agency of the federal government. But the Commission did not agree with this *a priori* argument. The Commission stated:

> "This [coordination] Article presupposes, as does the coordination of any endeavor, the willingness to plan cooperatively in order to serve the region in the most effective and enlightened manner. Certainly, the object of providing the optimum firm load carrying ability and of producing the maximum amount of usable secondary energy for the region could be frustrated by any participant, be he federal, public or private. However, it is beyond reasonable belief that any responsible agency, whether federal, public or private, would in the face of enlightened public opinion deliberately seek to sabotage the object of [this] Article 14 which was designed to secure for the Northwest benefits heretofore recognized

but, until recently, 'dom obtainable for a mixed river basin system'' (R. 785).

Certainly this attitude on the part of the Commission was not unreasonable. In addition to the favorable record of the companies that had organized Pacific Northwest and the unqualified representations of Pacific Northwest, the Commission could properly be influenced by the fact that Pacific Northwest and its stockholding companies operate in a closely regulated industry. They must look for their future fortune to the Commission. They could not, without jeopardizing the profits that are central to petitioner's apprehensions, renege on their repeated promises that they will protect the public interest. Indeed, Pacific Northwest has in a telling fashion demonstrated in this very case its appreciation of the requirements of the public interest. Pacific Northwest's refusal to build Nez Perce, despite the Commission's virtual offer of a license, and its adherence to the position that conservation required construction of a dam above, rather than below, the Salmon—a subject discussed at some length in our brief in No. 462—was an act in the public interest, as the Commission recognized.[19]

Furthermore, surely it is not axiomatic that federal ownership automatically solves all problems of coordination.

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[19] "As a matter of fact, PNPC [Pacific Northwest] is to be commended for sticking with its concept regarding the proper development of the Snake. With the issuance of the Commission's opinion on January 20, 1958, indicating its conclusion that Nez Perce represented the best development of this reach of the Snake, it would have been an easy matter for PNPC [Pacific Northwest] to have promptly filed a license application specifying this site. This it did not do. Rather, it insisted that any proposal which would block the Salmon River was not best adapted to comprehensive development. While equitable considerations are not relevant in determining the scope of a preliminary permit, we are nevertheless constrained to observe the irony involved in rejecting PNPC's [Pacific Northwest's] proposal to develop the Snake when its HMS application would promptly have been granted had the Commission properly analyzed the relative merits of a Nez Perce project" (R. 653).

The examiner—whose report was adopted by the Commission (R. 683)—stated:

> "Moreover, as emphasized by the Staff . . . Federal ownership does not assure coordinated operation or eliminate the necessity for resolving conflicts between the different Federal Agencies involved. . . . These include Army Engineers (navigation and flood control), Bureau of Reclamation (irrigation programs), Bureau of Indian Affairs, Fish and Wildlife Service, Bonneville Power Administration, and others. Coordination between these Federal Agencies is at least as difficult as coordination between Federal and non-Federal owners and operators (Report of the President's Water Resource Policy Commission, Vol. 3, 'Duplication and Conflict,' p. 508-509, 569 *et seq.*)" (R. 433-434).

Finally, as the Commission emphasized (see *supra*, p. 24), the problem of coordination in the Columbia River System is at root the problem of securing the cooperation of the many parties operating projects in the system. Surely the Commission could reasonably conclude, as it did, that this problem of securing cooperation among a number of parties would not be substantially affected if the High Mountain Sheep project were operated by one or another of the parties now operating existing projects —that is, by Pacific Northwest or by the federal government.[20]

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If we are correct in our view that there was a great deal of material before the Commission that was relevant to sec-

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[20] Indeed, it could be argued that operation by the federal government might increase, rather than diminish, the problem, entirely apart from the sort of inter-agency difficulties noted by the examiner. The Commission has the jurisdiction to require cooperation among licensees, but it has no such jurisdiction over the federal government. And, as the record in this case demonstrates, the federal government is not without its own type of "profit motive" with respect to federal projects in the Columbia River

tion 7(b), that the Commission's evaluation of that data was reasonable, and that there is no basis for concluding that significant additional evidence could have been introduced, then we take it that petitioner would agree that the Commission's order should be affirmed. As we read petitioner's brief, his complaints about the Commission's opinion are based upon the premises that the record was "barren of evidence" and that undiscovered, but discoverable, evidence existed that should have been secured. On these premises, the Commission's references to the lack of evidence supporting petitioner's section 7(b) claim take on precisely the coloration that petitioner suggests—that the Commission believed that in the absence of relevant evidence the decision should be in favor of the applicant regardless of whether such evidence could have been introduced. On the other hand, if our view of the record is correct, then surely no dark significance can be attributed to the Commission's observations that the record did not establish that federal development would be superior to development by Pacific Northwest. Petitioner quite properly concedes as much (Br. p. 26). On the most rigid standard of review and the most scrupulous parsing of an agency's opinion, the agency could hardly be faulted for referring to the failure

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System. As the Commission observed, "One of the principal reasons for the Department's opposition to non-federal construction appears to be its concern over a decline in BPA [Bonneville Power Administration] revenues which it feels might be accelerated if [High Mountain Sheep] power were made available directly or indirectly to some of its existing customers" (R. 669). As petitioner put it, he "has responsibility for repayment of the federal investment in the northwest hydroelectric system," and if High Mountain Sheep were built it would "displace already available federal energy and make it surplus." "The . . . result financially is that federal revenues diminish and that deficits arise which in turn may force rate increases" (R. 501-502; see also, *e.g.*, R. 42-46, 504). Indeed, there is evidence of record tending to show that, because of petitioner's desire to increase the revenues of the Bonneville Power Administration, coordination efforts prior to execution of the Coordination Agreement had been impeded (IV R. 136, 184-187).

of the evidence to support a contention where the record amply supported the opposing contention and where that evidence was complete in all material respects.

II. THE GROUND ADVANCED BY PETITIONER IN SUPPORT OF FEDERAL DEVELOPMENT IS NOT COGNIZABLE UNDER SECTION 7(B).

As we have already indicated, it is plain from petitioner's brief that his complaint about Pacific Northwest's proposed project rests only upon the fact that it is to be run by a private company. He feels that Pacific Northwest may, simply because it is a private company, sacrifice public interest to private profit. We have to this point assumed that, if evidence establishing this general proposition as to the intrinsic untrustworthiness of private companies were available, it could properly be considered by the Commission under section 7(b). However, this assumption cannot be sustained—the Congress in passing section 7(b) did not intend the Commission to base its recommendations upon its views as to the inherent superiority or inferiority of federal as against private hydroelectric development.

Petitioner's argument is basically, as we have repeatedly pointed out, the *a priori* contention that the Commission should presume that a project with significant public purposes—*e.g.*, power coordination, flood control, fish preservation—cannot be operated as effectively by a private company as by the federal government. "[I]t is unrealistic to expect a power company to discharge with optimal effectiveness, and in the teeth of its economic self-interest duties so traditionally public and federal as . . . flood control and navigation" (Br. p. 37).[21] To be sure, petitioner disclaims any

[21] See also, *e.g.*, the following: *"Prima facie,* the federal government is far more capable of performing these varied functions with maximum effectiveness than any licensee. . . . Perhaps the most important reason . . . is the antagonism between at-site power production—the sole interest that a non-federal operator would have—and the special functions that a project like High Mountain Sheep can perform. . . . A power company

argument that the Commission would be *obliged* to accept this view. However, the important point is that petitioner urges that the Commission *could* in its discretion adopt that position. If, however, it were to do so, the consequences would be that no major hydroelectric project would be licensed to private parties, since every major project is a multi-purpose project with important non-power functions.

Such a result would be foreign to the primary purpose of the Federal Power Act. As this Court has observed, "the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties." *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 251. See also *Chapman* v. *Federal Power Commission,* 345 U.S. 153, 167-168; *First Iowa Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 180-181. This view of the purpose of the statute is fully in accord with its legislative history, which we set forth in some detail in Appendix A. As that history demonstrates, from the time of President Theodore Roosevelt's administration, when the need for a national water policy first was raised in the Congress, until the enactment of the Act in 1920, the focus of the legislative effort was upon the establishment of a framework that would induce non-federal investors to construct hydroelectric projects, while at the same time subjecting those projects to sufficient controls to promote the public interest. In particular, section 10(a), which authorizes the

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would have a natural reluctance to relinquish its hydroelectric resources for purposes in which it has no economic stake. . . . [A]t-site [power] production is the only function of the dam in which a licensee would have any direct interest. . . . [T]he willingness of a power company to shoulder non-power public purposes or to coordinate its operations with a network of federal power projects is at least open to question, as is the appropriateness of delegating such essentially federal tasks to a non-federal entity. . . . A power company will normally be reluctant to incur non-power costs that may compel it to raise its rates. . . . To entrust such a resource to a company with a conflict of interest would appear, on the face of the matter, contrary to the purposes of Section 7(b)" . . . (Br. pp. 13, 14, 34, 35, 36).

Commission to issue licenses to non-federal applicants whose proposals are the "best adapted" to a comprehensive plan for development of waterways and "for other benefical public uses, including recreational purposes," reflects the Congressional expectation that such licenses would be issued to non-federal applicants for multi-purpose hydroelectric projects.

Surely it cannot be assumed that the Congress intended on the one hand to encourage private development of multipurpose projects and on the other to confer upon the Commission the authority to block that development whenever a major project is involved because of a presumption that all such projects must be federally developed. The legislative history respecting section 7(b), which was expressly designed by its sponsor simply to afford the federal government the opportunity to benefit from the leasing of water power in order to defray its expenses in improving the navigability of rivers, does not support the notion that the Congress intended to permit the Commission to eviscerate section 10(a) in such a fashion (see pp. 44-51, *infra*).

It is relevant that the Congress was fully conscious of the subject of preferences and priorities. As we discuss at some length in our brief in No. 462, the Congress resolved the conflicting claims of public power and private power groups by granting a priority to any company that secured a preliminary permit, and by according a preference to public power entities in the assignment of such permits. See 16 U.S.C. 800. This decision by the Congress was precisely the type of political decision that falls within the legislative function. But the Congress did not confer any preference upon the federal government, and it is scarcely credible in these circumstances that the Congress intended that the Commission could award a preference.

III. THE COMMISSION'S DETERMINATION THAT THE NEED FOR PROMPT CONSTRUCTION MILITATED AGAINST A RECOMMENDATION FOR FEDERAL DEVELOPMENT CONSTITUTES AN INDEPENDENTLY SUFFICIENT BASIS FOR THE COMMISSION'S ACTION.

Even if the Commission's analysis of the relative merits of federal versus non-federal development of High Mountain Sheep were in some way defective, the Commission's order should not be set aside because it was grounded upon an independent, and sufficient, ground: the probable delay in federal development coupled with an urgent need for power.

The Commission's section 7(b) determination was based, first of all, upon the Commission's conclusion that there would be no advantage to federal development even if "the actual choice . . . was between federal construction now and non-federal construction now" (R. 664). The second ground for the determination was that "these are not the true alternatives" because "federal construction . . . is not foreseeable," and that "[t]his disadvantage outweighs those benefits which Interior contends would result from federal construction (i.e., superior co-ordination and non-power benefits discussed above), assuming *arguendo*, that such benefits would be realized" (R. 668-669).

The Commission was entitled to take into account the factor of probable delay in federal construction. See *Chapman* v. *Federal Power Commission*, 345 U.S., at 169, where this Court stated with respect to section 7(b): "Particularly relevant in this regard is the estimate that public development at this site would not in the normal course be undertaken for many years." See also *National Hells Canyon Ass'n* v. *Federal Power Commission*, 237 F.2d 777, 781 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 924. Certainly this approach is reasonable. One of the primary concerns

of the Commission is to insure that the public is furnished with an adequate supply of power, so that, as the Commission put it here, it is important to consider whether there would be a "delay in federal construction [which] would foreclose power coming on the line at a time when it will be required" (R. 669).

Petitioner maintains that "the record before the Commission is now stale" respecting the question of delay, for petitioner "now agrees with the Commission that early construction of High Mountain Sheep is justified, and he is prepared to seek prompt authorization of a federal project from Congress . . ." (Br. p. 29). Thus, petitioner, having unsuccessfully urged first that there should be no High Mountain Sheep project for years to come and then that it should be developed by the federal government at some indefinite time in the future, now wants the case remanded on the ground that he has shifted his position once again.

Whatever might be said for so drastic an impairment of the finality of administrative proceedings in other circumstances, there is surely no justification in this case. In the first place, the fact that the Secretary now is willing to seek legislation is hardly any indication that the Congress is willing to enact it. After all, this proceeding has been going on, attended by widespread publicity, for some 14 years, and the Congress has shown no interest whatever in preserving High Mountain Sheep for federal development.[22] At any

[22] On the contrary, when the Congress was informed that the Presiding Examiner proposed to license High Mountain Sheep to Pacific Northwest, it immediately removed China Gardens—the downstream reregulating dam—from the then current Rivers and Harbors bill, which had already passed both houses, in order to give the Commission the opportunity to license that project also. The Manager in the House for the Conference Report stated:

> "I am glad to report to the House that China Gardens was removed, as you recall, from the House bill. As you recall, we had it up on the floor of the House, and we had a vote. It was a close vote. I understand the examiner for the Federal Power Commission has recommended the Mountain Sheep $260-and-some-odd-million

time during these 14 years the Congress could have intervened. Nor has petitioner, who changed his mind at least some time before filing the petition for certiorari on August 19, 1966, attempted to secure any indication of Congressional interest, so far as appears from his brief.

Moreover, if petitioner wishes to persuade this Court now, and ultimately the Commission, that there is a good prospect of prompt federal action, at the very least he could have put himself in a position to represent that a request for appropriations for the project would promptly be submitted as part of the budget. But he does not even represent that the Bureau of the Budget would be prepared to seek appropriations. There is good reason to believe that it would not, for on April 11, 1962, commenting on a Corps of Engineers report which discussed the possibility of Bureau of Reclamation construction of a project at High Mountain Sheep (H.R. Doc. No. 403, 87th Cong., 2d Sess.), the Bureau of the Budget stated: "You are also advised that no commitment can be made at this time as to when any estimate of appropriations would be submitted for the recommended projects, if authorized by the Congress, since this would be governed by the President's budgetary objectives as determined by the then prevailing fiscal situation" (R. 441). If the Bureau was non-committal in 1962, it seems likely that the "prevailing fiscal situation" at this time does not augur well for federal construction of High Mountain Sheep.

Finally, highly relevant to petitioner's "staleness" contention is the consideration that the Commission's decision

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project—as a private enterprise development. China Gardens is an integral part of that total project so it seemed a logical thing to me that likewise the Federal Power Commission should have the opportunity of considering the China Gardens project." 108 Cong.Rec. 23417, 87th Cong., 2d Sess. (Oct. 12, 1962).

not to recommend federal development in no way forecloses the Congress from appropriating the High Mountain Sheep project, either now or at any time in the future. As this Court noted in *Chapman:*

> "... Congress was of course aware that, by granting a license to private enterprise, the Federal Power Commission would not commit the site permanently to private development and preclude all further congressional action. The Commission would, as it did here, simply express its judgment that, at the time, private development of the site was consistent with the general conception of the way in which the Roanoke River Basin should be developed. For, at any time short of the fifty years in which a site automatically becomes available to the Government without compensation, the Government may determine that the public interest makes it more desirable that the project be operated publicly and has the right then, by appropriate steps, to take over the project. 41 Stat. 1071, as amended, 49 Stat. 844, 16 U.S.C. § 807." 345 U.S., at 169-170.

In these circumstances, the fact that petitioner has had a change of heart should not result in further prolongation of this already extended proceeding.

IV. THE ISSUE RAISED BY PETITIONER IS NOT REVIEWABLE.

Finally, we turn to a question—the reviewability of the Commission's order—that in terms of logic should perhaps have been dealt with at the start, but that can be more effectively discussed at this point because it turns in large measure upon the character of the Commission's determination under section 7(b) and the character of the contentions made by petitioner in this case. In our view, those conten-

tions are not reviewable because the Congress never intended that the judiciary oversee the Commission when it exercises its discretion in deciding not to make a section 7(b) determination. Our position rests upon both the language of section 7(b) and the nature of the Commission's recomendation.

First, the statute shows that the Congress meant to leave entirely to the Commission the decision whether to recommend federal development. As this Court observed in *Chapman* in connection with the "in the judgment of the Commission" language of section 7(b), "Petitioners in effect ask us to tell the Commission what it thought.... Whatever the merits of the controversy as to which agency—the Government or a private party—should construct this project, that question is not within our province." 345 U.S., at 173-174.[23] Had the Congress intended that the courts review the decision of the Commission not to recommend federal development, it would have provided some sort of standard, however broad, to guide the courts. It did not do so. As petitioner's counsel before the Commission conceded—at a time when petitioner's major contention was pre-emption—"the words 'in the judgment of the Commission' give you [the Commission] practically unlimited discretion' (R. 49).[24]

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[23] The issues in *Chapman*, which are different than the issues raised here, were justiciable. The principal issue there was whether the Congress had preempted the hydroelectric site in question for federal development. In the case at bar, petitioner also, as we have noted, pressed a similar contention in the lower court, but has now abandoned it. *Chapman* also involved a section 7(b) contention that the Commission had in fact made a determination in favor of federal development, but nonetheless had granted a license in the face of the flat prohibition of the statute. While the contention was, as this Court held, insubstantial, it was reviewable.

[24] "Presiding Examiner: Do you find a test in 7(b)?

"Mr. Hogan: Yes, in the first two clauses, Mr. Chairmar. 'Whenever, in the judgment of the Commission' and then the tests 'whenever the develop-

Second, the Commission's decision in declining to recommend federal construction is of such a character that it seems most unlikely that the Congress would have intended that it be reviewed by the courts. As we have pointed out in another connection and as this Court observed in *Chapman* (*supra*, p. 38), the failure of the Commission to recommend federal development in no way forecloses the Congress from appropriating the project for federal development or operation at any time, either before or after construction by a licensee. Nor, for that matter, does it foreclose the Congress from at any time requesting a report from the Commission as to its views. But, as this Court observed in holding unreviewable orders of the Civil Aeronautics Board relating to foreign air transportation routes because, *inter alia*, those orders could be disregarded by the President and thus had "only the force of a recommendation to the President": "This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional courts to

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ment of any water resources for public purposes should be undertaken by the United States—

"Chairman Swidler: That is not a test. That just says: 'Whenever in our judgment the development should be made by the United States.' But where is the test when it should be developed by the United States?

"Mr. Hogan: In this particular instance I don't really have to even suggest an argument on it, Mr. Chairman, because Congress has answered the question. The water resource we are talking about here is from Asotin, downstream, nine projects.

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"Chairman Swidler: I see the argument, but I don't see any test in the statute, which leaves it to our judgment, as I see it. I think we would like to hear the points that you make on how our judgment should be guided. But I find no test here, Mr. Hogan.

"Mr. Hogan: I do agree that the words 'in the judgment of the Commission' give you practically unlimited discretion. You have solved that problem in the past by incorporating really into that first clause of this 7(b) the comprehensive test which is set forth in 10(a) in your practical application. But really what I am suggesting is that in this instance you don't have to exercise judgment, because Congress has for you" (R. 48-49).

render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administration action." *Chicago & Southern Airlines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 13-114.[25]

In short, where the decision of the agency not to recommend to the Congress federal development of a project does not in any respect foreclose the Executive from seeking federal development or the Congress from authorizing it, and where any judicial review would require the courts to fashion standards where none are set forth in the statute, the proper conclusion is that all that the Congress intended by section 7(b) was to impose upon the Commission a responsibility as to which the Commission is accountable only to the Congress, not to the courts.[26]

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[25] See also *Hayburn's Case*, 2 Dall. 409, 411-412 (refusal of courts to comply with statute calling upon them to certify to Secretary of War findings respecting soldiers' disability because those findings could be suspended by Secretary and revised by Congress); *United States* v. *Ferreira*, 13 How. 40 (similar holding respecting monetary awards under foreign treaty where Secretary of Treasury could disregard court's decision); *Gordon* v. *United States*, 117 U.S. 697, 702-703 (no power to review judgments of Court of Claims that were subject to revision by Secretary of Treasury and Congress); *In re Sanborn*, 148 U.S. 222, 224-227 (similar); *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 481-487; *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 456-458, 461-462; *United States* v. *Jefferson Electric Mfg. Co.*, 291 U.S. 386, 400-401; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 579-582.

[26] For the sake of completeness, we should perhaps add that our position does not imply that an applicant who is denied a license because of a section 7(b) determination cannot secure judicial review. In that situation, the section 7(b) determination *is* conclusive of the rights of the applicant. Accordingly, while the scope of review would doubtless be very narrow, such a party might be able to secure judicial relief against wholly arbitrary action by the Commission.

Conclusion

It is, at the end, appropriate to consider the practical consequences of the relief requested by petitioner. The Commission found, and all now agree, that there is an urgent need for construction of the High Mountain Sheep dam. If this Court were to remand the case for reconsideration, there would unquestionably be a further lengthy delay, not only because of the Commission proceeding on remand, but also because of the almost inevitable renewed appeals from the Commission's decision, whatever it might be. And to what avail? The decision whether there is to be federal construction is the Congress', not petitioner's, not the Commission's. Petitioner could at any time—he could tomorrow—attempt to ascertain the Congress' disposition. Evidently what he intends, if there is a remand, is to await the outcome. At that point, if the determination were in favor of federal development, he would still have to go to the Congress. The Congress might or might not authorize federal construction—and the evident lack of interest of the Congress during the past 14 years indicates it will not—so that some time in the indeterminate future the license proceeding might have to be reopened. At that point, whether competing applicants could enter, and how stale the record might be, could be open questions. If the Commission's decision on remand, on the other hand, is in favor of Pacific Northwest—as certainly seems predictable since petitioner has made no contentions here he has not already made to the Commission—petitioner can still, as he can now, ask the Congress to preempt the site.

In short, it is clear that a reversal of the Commission at this point would almost surely preclude prompt construction of High Mountain Sheep by anybody, and it is also clear that if petitioner has a genuinely persuasive case for federal development—persuasive, that is, to the Congress,

the final arbiter—affirmance of the Commission cannot forfeit the interests of the United States. Accordingly, we submit that orderly administration of the Federal Power Act requires that the proceedings under that statute be ended now and that the judgment below be affirmed.

Respectfully submitted,

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APPENDIX

Legislative History Of The Federal Power Act And Section 7(b) Thereof

The origins of the Federal Power Act of 1920 can be traced to the River and Harbor Act of September 19, 1890, 26 Stat. 426, which contained the first general statutory provisions relating to the construction of dams. From that time until 1920, the various House and Senate debates and hearings, committee reports, presidential commission studies, bills, and presidential vetoes and messages relating to water power development centered on a single general theme—the best method of encouraging private enterprise to invest in water power development while at the same time sufficiently regulating such private development. See, *e.g.*, the Public Lands Rights of Way Act of February 15, 1901, 30 Stat. 790 (authorizing the Secretary of the Interior to grant permission to private parties to use rights of way through public lands and forest reserves for electrical generating and distributing structures as well as dams); the Act of February 1, 1905, 33 Stat. 628 (transferring such authorization where the forest reserves were concerned to the Secretary of Agriculture); Message of President Roosevelt to Congress on March 4, 1903, 36 Cong. Rec. 3071 (vetoing bill providing for construction of power station at Muscle Shoals); General Dam Act of June 21, 1906, 34 Stat. 386 (permitting private parties to construct and maintain dams for water power and other purposes across navigable waters subject to the approval of both the Secretary of War and the Chief of Engineers); Message of President Roosevelt to Congress on December 17, 1906, S. Doc. No. 283, 61st Cong., 2d Sess. 7 (on the reform of the land laws); March 13, 1908 letter from President Roosevelt to the Chairman of the Senate Committee on Commerce, S. Rep. No. 585, 60th Cong., 1st Sess. 2 (objecting to certain bills conferring water rights which did not contain the protective provisions he desired); Message of President Roosevelt to Congress on April 13, 1908, Federal Control of Water Power: Papers submitted to the Committee on Commerce, United States Senate, 62d Cong., 3d Sess. 34-36

(vetoing bill allowing a person to construct a dam across the Rainy River); Message of President Roosevelt to Congress on January 15, 1909, H. Doc. 1350, 60th Cong., 2d Sess. 5 (vetoing a bill authorizing the construction of a dam across the James River); Report of the Subcommittee of Dams and Water Power of the House Committee on Interstate and Foreign Commerce, Federal Control of Water Power, *op. cit. supra*, pp. 32-33 (considering the Rainy River and James River problems); Message of President Taft to Congress on January 14, 1910, H. Doc. No. 533, 61st Cong., 2d Sess. 3-6 (on water power and conservation); the final report of the National Waterways Commission, presented on March 25, 1912, S. Doc. No. 469, 62d Cong., 2d Sess. 37-38, 43, 54, 59; S. Rep. No. 1131, 62d Cong., 3d Sess. 2 (1913) (on bill to allow a dam to be built upon the Connecticut River).

Beginning in 1914, the tempo of legislative efforts to enact general legislation increased. The purpose, however, remained the same. Thus, for example, in 1914 the Committee on Interstate and Foreign Commerce, in reporting its bill, stated:

> "... . In reporting this bill to amend the general dam act we have tried faithfully to protect all the interests of the Government, every project for which the consent of Congress may be granted, at the same time imposing such fair and moderate terms and conditions of the consent of Congress as may induce capital to relieve the Government of the expense of promoting navigation by furnishing the capital and constructing the works in the hope of reasonable returns on investments." H.R. Rep. No. 592, 63d Cong., 2d Sess. 3 (1914).

Similarly, the Senate Committee on Commerce stated:

> "It is believed the bill is fair and just between the public and water-power development, and adequately protects the interest of the Government; that it properly conserves an exceedingly valuable asset that should be utilized; and at the same time offers sufficient inducement for its fullest development through private

interests, municipal and public-utility corporations. . . ."

[The Committee also expressed its hope]

"that the bill will 'intelligently balance encouragement against restraint.' " S. Rep. No. 846, 63d Cong., 3d Sess. 2 (1914).

The following year the Senate Committee on Public Lands described the purpose of its bill as follows:

"The object of this measure is the better and speedier development for useful and beneficial purposes of the great undeveloped water power of the country, now lagging on account of inadequate and inefficient laws. It is universally admitted that the present laws for the development of water power are lame and ineffective, and that new legislation must be had before the great and untold benefits to civilization, progress and growth from the latent water power of the country may be had. This bill seeks to attain that result. . . .

"The committee recognizes that one of the chief objects of the bill is to promote the development of power projects and procure money for investment therein upon terms fair and just alike to investors, the Government, and the public." S. Rep. No. 898, 63d Cong., 3d Sess. 3, 6 (1915)

And in 1916 the Senate Committee on Commerce reported:

"The bill provides primarily for the improvement of navigation in rivers under the jurisdiction of Congress with private capital, as distinguished from appropriations by Congress for that purpose and, secondarily, for the development and utilization of the water power of those rivers resulting from such improvement, as well as that created by dams constructed and to be constructed under the authority of Congress. The secondary purpose of the bill is the inducement for the investment of private capital in the improvement of navigable streams and without which it would not be so invested or improvements made. . . .

> "The committee is also of the opinion that the secondary object of the bill—that is, the development and utilization of the water power of navigable streams—is of equal importance to the primary object, although it is in a sense incidental to it, and it is believed that the provisions of the bill concerning this are ample to accomplish that purpose." S. Rep. No. 89, 64th Cong., 1st Sess. 1-2 (1916).

The House Committee on Interstate and Foreign Commerce, which reported a different bill on the same matter, adhered to the same basic policy:

> "In reporting this bill to amend the general dam act we have tried faithfully to protect all the interests of the Government in every project for which the consent of Congress may be granted, at the same time imposing such fair and moderate terms and conditions of the consent of Congress as may induce capital to relieve the Government of the expense of promoting navigation, and to supply the public with essential elements of prosperity by furnishing the capital and constructing the works in the hope of reasonable returns on investments." H.R. Rep. No. 404, 64th Cong., 1st Sess. 8 (1916).

Finally, the Senate Committee on Commerce repeated in 1917 the identical statement of goals and objectives that it had used in reporting a similar bill the year before. See pp. 45-46, *supra*. S. Rep. No. 179, 65th Cong., 2d Sess. 1-2 (1917).

The history and aims of every one of these bills was best summarized by the Select House Committee on Water Power in reporting out the Administration Bill that was eventually to become the Federal Water Power Act. H.R. Rep. No. 61, 66th Cong., 1st Sess. 3 (1918). The Committee, reviewing the neglect of water power development because of difficulties with the legislation, stated that "owing to imperfections in the act of 1910 and the omission of any suitable recapture and the failure to construct dams thereunder, Congress for the last six or eight years has been

seeking to enact legislation, which, while encouraging private enterprise and the investment of private capital, would yet safeguard the public interest, but these efforts on the part of Congress were not coordinated."

The Administration bill of 1918, which became the Federal Water Power Act, as it was presented to the Select House Committee on Water Power, envisioned no role for the federal government as a power entrepreneur. Neither section 5 nor section 7 contained any reference to the United States as a possible developer. When the three Secretaries (Interior, War and Agriculture) sent the House Water Power Committee a revised version of the omnibus bill on February 27, 1918, that bill, too, said nothing about federal development. Indeed, the letter of transmittal contained the following capsule statement of the purpose of the redraft—"Water power legislation should have in view not only the maintenance of the rights of the public in the national resources, but also the adequate protection of private capital by which such resources are developed. The bill before you aims to do both." H.R. Rep. No. 715, 65th Cong., 2d Sess 29 (1918).

Nor was there any indication that there might be federal development of dam sites, as contrasted with federal approval of private or municipal construction and operation of power projects, at any point during the March-May 1918 hearings of the House Committee on Water Power upon the omnibus bill. The executive branch's chief witness, O. C. Merrill, Chief Engineer of the Forest Service, in explaining the Administration's point of view on the bill, said: "While it is essential that water-power legislation should fully protect the public interests in our national resources, it is equally essential that adequate protection should be given to the private capital by means of which such resources are developed. It is believed that the bill meets both requirements and that under its provisions capital can be secured and development will take place." Hearings Before the House Water Power Committee, 65th Cong., 2d Sess. 14 (1918).

However, in the Appendix to the Hearings, at pp. 872-873, there appears a letter from Chief Engineer Merrill to

Committee Chairman T. W. Sims in which Merrill proffered a draft of a new section to meet Sims' privately expressed desire to include in the bill a provision "which would authorize the commission to deny application for projects which, in the judgment of the commission, should be constructed by the United States itself." That section, which Merrill termed "advisable," was incorporated verbatim as the second paragraph of section 7 of the bill that emerged from Committee on June 28, 1918, without any explanation of what its function was to be. See H.R. Rep. No. 715, *op. cit. supra,* at 5. A proviso was also added to Section 4(d), delaying further licensing power on a government dam for two years if the Commission found and reported to Congress that the dam "may be advantageously used by the United States for its public purposes," thereby giving the United States the right to operate a navigation dam for some other purposes. *Id.* at 4. Notwithstanding these changes, the purpose of the bill remained the same:

> "The theory of the substitute which is herewith reported is to provide for the development of hydroelectric power by private capital and at the same time to so regulate the cost to the consumers as to prevent monopoly and to encourage production." *Id.* at 15.

The Senate Commerce Committee supported this view of the bill when it adopted the bill as approved in conference. S. Rep. No. 180, 66th Cong., 1st Sess. 3 (1919). The Committee stated:

> "Legislative action should be delayed no longer. We should do one of two things: We should pass legislation which would lead private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power, or the Government itself should proceed to make this development. This bill proceeds on the theory of private development with ultimate public ownership possible."

During the debate on the House floor on S. 1419, Chairman Sims, a partisan of federal activity, explained the added paragraph of Section 7 as follows:

"This bill provides for unlimited, unrestricted development and operation of water power projects by the United States Government. . . . .

"Those who believe in Federal Government ownership and operation of water-power projects will find what they believe in provided for not only in principle but to some extent in detail in the bill. So those people who care more for United States Government ownership than they do for the other provisions of the bill have a provision in the bill that, I imagine, will meet with their hearty approval. . . .

"The power given to the United States Government to develop, own, and operate projects of this kind is without any limit or restriction whatever, except as to the consent of Congress and the appropriation of the necessary funds. Of course, no permit can be given to the Government of the United States by the commission, because its sovereignty over this question is of the highest in degree and form. . . ." 56 Cong. Rec. 9037 (1918).

In an extended colloquy between Sims and other members of the House who were concerned as to the exact character of the role the federal government was to play under the bill, it was made clear that this would depend upon the Congress' willingness to pass legislation respecting specific projects, and that the Commission's recommendation for federal development would not bind the Congress. See 56 Cong. Rec. 9037 (1918).

In the course of discussion in the House in 1919 concerning the Conference Report, Chairman Sims acknowledged that he was responsible for the insertion of the second paragraph of section 7. In defending it, he argued that it was not included for the purpose of transforming the United States into a competing developer with a built-in advantage, but solely to permit the federal government to recoup the cost of erecting navigation structures. Replying to criticisms of section 7(b), Sims said:

"The gentleman from North Carolina not only wants to permit private capital to be thus profitably invested, but he wants to remove all chance for the Government to reimburse itself for any expenditure it may make in order to improve navigation and thereby remove the burden from the common taxpayer to the extent and value of the return which it gets from leasing out the water power. But the commission is not authorized to expend money in development. The commission may, however, when an application is made to it for a license to build a navigation project or to build a water power upon Government-owned land, if it deems it in the public interest that the Government should make this improvement and get the benefit of the resulting water power, and lease it out at a sum to reimburse the Government as far as it will for the cost increase, withhold the license and recommend to Congress that the Government make the improvement. The gentleman from North Carolina would deprive it of this right, but would be very willing for the common taxpayer to furnish the money to improve navigation where no private capital can make money by making the improvement, where no resulting water power would follow; the gentleman from North Carolina has no objection to the common taxpayer carrying the burden of building a dam for navigation purposes where no resulting water-power benefits may follow." 58 Cong. Rec. 2038 (1919). See also 56 Cong. Rec. 9121 (1918), 58 Cong. Rec. 2037, 2039 (1919).

Thus every congressional committee and presidential reference to the relationship between the federal government and private capital with respect to the development of water power resources from 1890-1920 adheres to me principal theme—development by non-federal investment subject to federal controls, recapture, and possible construction.